

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLIVEN D. BUNDY *et al.*,

Defendants.

Case No.: 2:16-cr-46-GMN-PAL

**ORDER**

Pending before the Court is the Motion to Reconsider (ECF No. 1565) the Court's Protective Order regarding the Government's Undercover Employee (ECF No. 1539) filed by Defendants Steven A. Stewart, Eric J. Parker, and O. Scott Drexler's ("Defendants"). Co-defendants Gregory P. Burleson and Ryan W. Payne filed Motions for Joinder. (ECF Nos. 1567, 1610). The Government filed a Response. (ECF No. 1611).

**I. LEGAL STANDARD**

Although the Federal Rules of Criminal Procedure do not expressly authorize the filing of motions for reconsideration, "numerous circuit courts have held that motions for reconsideration may be filed in criminal cases." *United States v. Hector*, 368 F. Supp. 2d 1060, 1063 (C.D. Cal. 2005), *rev'd on other grounds*, 474 F.3d 1150 (9th Cir. 2007) (citing *United States v. Martin*, 226 F.3d 1042, 1047 n.7 (9th Cir. 2000) for the proposition that "post-judgment motion for reconsideration may be filed in a criminal case and governed by Fed. R. Civ. P. 59(e)"); *see also United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir. 2003) ("As noted by the Second and Ninth Circuits, motions for reconsideration may be filed in criminal cases"). "A motion to reconsider must demonstrate some valid reason why the Court should reconsider its prior decision, and it must set forth facts or law of a strongly convincing nature to induce the

1 Court to reverse itself.” *United States v. Walsh*, 873 F. Supp. 334, 337 (D. Ariz. 1994). A  
2 motion for reconsideration “should not be granted, absent highly unusual circumstances.” *Kona*  
3 *Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (quotations omitted).

## 4 **II. DISCUSSION**

5 On January 27, 2017, the Government filed a Motion for a Protective Order regarding an  
6 Undercover Employee (“UCE”) witness it intends call in its case-in-chief. (ECF No. 1440).  
7 Upon review of the parties’ briefing of this Motion in Limine, the Court found it appropriate to  
8 enter a protective order as to the UCE witness. (UCE Protective Order, ECF No. 1539). The  
9 Court found “good cause here to protect the UCE’s identity by adopting the measures requested  
10 by the Government to prevent harassment, protect the UCE’s safety, and safeguard the UCE’s  
11 unrelated on-going investigations.” (*Id.* 4:15–17). The Court further determined that the UCE’s  
12 date of birth and unrelated investigations are not relevant to this case. (*Id.* 4:17–19). This  
13 protective order implemented the following precautions to protect the UCE:

- 14 1. The UCE may testify at trial using an undercover pseudonym without publically  
15 disclosing his true identity, specifically, the government requests that the UCE testify as  
16 “Charles Johnson,” his cover identity;
- 17 2. The defense shall be prohibited from asking any questions seeking personal  
18 identifying information (to include name, contact information, or date or place of birth)  
19 from the UCE;
- 20 3. The defense shall be prohibited from asking any questions about other investigations  
21 in which the UCE may be involved, including any ongoing investigations;
- 22 4. No public disclosure of any audio recording, or similar reproduction of the voices or  
23 visual images of the UCE while testifying, shall be permitted;
- 24 5. The UCE shall be permitted to use a non-public entrance/exit to the courthouse and  
25 the courtroom (outside the presence of the jury); and
6. All non-official recording devices shall be prohibited from being in the courtroom in  
which the UCE testifies, including personal cellular phones.

(*Id.* 5:1–9).

1 In the instant Motion, Defendants seek reconsideration of the UCE Protective Order  
2 such that they should be provided with the witness's identity in advance to effectively prepare  
3 for cross-examination. (Mot. Recons., ECF No. 1565). Defendants assert that without the  
4 UCE's identity, their Sixth Amendment Confrontation Clause rights will be violated because  
5 they will not be able to effectively cross-examine the UCE. (*See id.* 4:1–20). As such,  
6 Defendants request that the Court either “(1) lift the protective order, or (2) preserve the  
7 protective order but direct the government to reveal the witness' identity to the defendants  
8 immediately so that they can vindicate their Sixth Amendment confrontation rights by  
9 preparing for impeachment of the witness.” (*Id.* 5:20–6:1). The Government responds that  
10 Defendants have not met the high burden for reconsideration. (Gov't Resp. 3:3–4:14, ECF  
11 No. 1611).

12 The district court has discretion “to impose reasonable limits on such cross-examination  
13 based on concerns about, among other things, . . . the witness' safety.” *Delaware v. Van*  
14 *Arsdall*, 475 U.S. 673, 679 (1986). There is “no fixed rule with respect to disclosure.” *Roviaro*  
15 *v. United States*, 353 U.S. 53, 62 (1957). Instead, there must be a “balancing [of] the public  
16 interest in protecting the flow of information against the individual's right to prepare his  
17 defense,” which depends on “the particular circumstances of each case.” *Id.* In *Smith v.*  
18 *Illinois*, 390 U.S. 129 (1968), this balancing required disclosure of the witness's name because  
19 the “only real question at trial” was the credibility of the single, principal witness, who was the  
20 only person, other than the defendant, who testified about the crucial events at issue. *Smith*, 390  
21 U.S. at 130. But *Smith*, unlike the instant case, did not involve issues of witness safety or  
22 ongoing investigations. *See id.* at 133–34 (White, J., concurring) (recognizing as beyond the  
23 proper bounds of cross-examination “those inquiries which tend to endanger the personal safety  
24 of the witness”); *see also United States v. Rangel*, 534 F.2d 147, 148 (9th Cir. 1976), *cert.*  
25 *denied*, 429 U.S. 854 (1976) (“*Smith v. Illinois* does not establish a rigid rule of disclosure, but

1 rather discusses disclosure against a background of factors weighing conversely, such as  
2 personal safety of the witness.”) (internal quotation marks omitted).

3 First, the Court first notes that the UCE Protective Order (ECF No. 1539) specifically  
4 precluded *public* disclosure of the UCE’s true identity, but it did not opine as to Defendants  
5 obtaining the UCE’s identity under the main Protective Order in this case (ECF No. 609).  
6 Indeed, in one of the cases that both parties cite to, the D.C. Circuit affirmed a protective order  
7 regarding a UCE that is substantially similar to the one granted in this case, “where the  
8 government disclosed the true identities of protected witnesses to defense counsel and those  
9 witnesses testified at trial under pseudonyms.” *United States v. Celis*, 608 F.3d 818, 833 (D.C.  
10 Cir. 2010). Similarly, as Defendants argue, in *Clark v. Ricketts*, 958 F.2d 851 (9th Cir. 1991),  
11 the Ninth Circuit affirmed concealing a witness’s identity from the jury when the defendant  
12 was provided with his true name and felony record ahead of his testimony. *Clark*, 958 F.2d at  
13 855.

14 Here, as the Court previously found, there is a strong basis for public anonymity of the  
15 UCE given concerns for harassment, the UCE’s safety, and the protection of his on-going  
16 investigations. (*See* UCE Protective Order 4:14–17). However, the Court finds that  
17 Defendants’ Sixth Amendment rights dictate protected disclosure of the UCE’s name limited  
18 only to Defendants for purposes of preparing for cross-examination. Nevertheless, the Court is  
19 wary of providing this information to Defendants based on recent allegations of a Protective  
20 Order violation. As such, the Court finds good cause that only counsel and stand-by counsel  
21 shall be provided the name of the UCE witness. As the Court stated previously, the UCE’s date  
22 of birth and unrelated investigations are irrelevant and need not be disclosed. Additionally, all  
23 aspects of the UCE Protective Order (ECF No. 1539) shall remain in effect, including the  
24 prohibition on Defendants from asking any questions seeking personal identifying information  
25 during cross-examination.

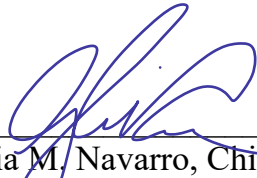
1 Accordingly, the Court grants Defendants' Motion for Reconsideration to extent that the  
2 Court orders the Government to disclose to counsel and stand-by counsel the true name of the  
3 UCE witness. The UCE witness's name is confidential information covered by the main  
4 Protective Order in this case. (*See* ECF No. 609). The Court denies Defendants' Motion in all  
5 other respects.

6 **III. CONCLUSION**

7 **IT IS HEREBY ORDERED** that Defendants' Motion for Reconsideration (ECF  
8 No. 1565) is **GRANTED in part, DENIED in part**. Defendants' Motion is granted to the  
9 extent that the Government shall disclose to counsel and stand-by counsel the true name of the  
10 UCE witness, which is covered by the Protective Order (ECF No. 609). Defendants' Motion is  
11 denied as to all other respects.

12 **IT IS FURTHER ORDERED** that the Motions for Joinder (ECF Nos. 1567, 1610) are  
13 **GRANTED**.

14 **DATED** this 6 day of March, 2017.

  
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Gloria M. Navarro, Chief Judge  
United States District Court